The Yale Law Journal

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by

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109 YALE L.J. 817

Volume 109 **January 2000** **Number 4**

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Though in many natural objects, whiteness refiningly enhances beauty, as if imparting some special virtue of its own, as in marbles, japonicas, and pearls; and though various nations have in some way recognised a certain royal pre-eminence in this hue; even the barbaric, grand old kings of Pegu placing the title 'Lord of the White Elephant' above all their other magniloquent descriptions of dominion; and the modern kings of Siam unfurling the same snow-white quadruped in the royal standard; and the Hanoverian flag bearing the one figure of a snow-white charger; and the great Austrian Empire, Caesarian heir to the overlording Rome, having for the imperial color the same imperial hue; and though this pre-eminence in it applies to the human race itself, giving the white man ideal mastership over every dusky tribe; and though, besides all this, whiteness has been even made significant of gladness, for among the Romans a white stone marked a joyful day; and though in other mortal sympathies and symbolisings, this same hue is made the emblem of many touching, noble things—the innocence of brides, the benignity of age; though among the Red Men of America the giving of the white belt of wampum was the deepest pledge of honor; though in many climes, whiteness typifies the majesty of Justice in the ermine of the Judge, and contributes to the daily state of kings and queens drawn by milk-white steeds; though even in the higher mysteries of the most august religions it has been made the symbol of the divine spotlessness and power; by the Persian fire-worshippers, the white forked flame being held the holiest on the altar; and in the Greek mythologies, Great Jove himself being made incarnate in a snow-white bull; and though to the noble Iroquois, the mid-winter sacrifice of the sacred White Dog was by far the holiest festival of their theology, that spotless, faithful creature being held the purest envoy they could send to the Great Spirit with the annual tithings of their own fidelity; and though directly from the Latin word for white, all Christian priests derive the name of one part of their sacred vesture, the alb or tunic,

> worn beneath the cassock; and though among the holy pomps of the Romish faith, white is specially employed in the celebration of the Passion of our Lord; though in the Vision of St. John, white robes are given to the redeemed, and the four-and-twenty elders stand clothed in white before the great white throne, and the Holy One that sitteth there white like wool; yet for all these accumulated associations, with whatever is sweet, and honorable, and sublime, there yet lurks an elusive something in the innermost idea of this hue, which strikes more of panic to the soul than that redness which affrights in blood.
>
> —Herman Melville, *Moby-Dick*[1]

I. INTRODUCTION: THE ANTINOMY OF WHITENESS

The antinomy of whiteness has haunted our nation since its founding. For much of American history, the concept of whiteness has embodied an ostensibly august and pure tradition while simultaneously enforcing a regime of fear and oppression. This internal contradiction is poignantly unmasked in Herman Melville's 459-word sentence from *Moby-Dick* about the color white and all of its accompanying honor and terror. Captain Ahab's mad search for the great white whale matches the American Republic's fruitless search for a concept of race[2] around which it could organize itself. Even today, the concept of race remains vital for an understanding of our social structures. To almost all Americans, the word "white" continues to connote race. The color has transcended its chromatic meaning and woven itself into a web of social, political, and economic entanglements that define our nation and its people, for better or worse. Despite the importance of racial definitions to individual identities and social structures, whiteness has remained an elusive and abstract concept. During the late nineteenth and early twentieth centuries, immigration statutes forced the American legal system to confront the task of defining what or who constituted the white race for the purposes of naturalization.

Shortly after the ratification of the Constitution, Congress limited naturalization to "any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years."[3] Following the Civil War, Congress responded to the *Dred Scott*[4] decision by extending the right of naturalization to "aliens of African nativity and to persons of African descent."[5] Until 1952,[6] only whites and blacks could qualify for naturalization.[7] During the early years of the Republic, no litigation resulted from these naturalization requirements. At that time, the ethnic makeup of the country lent itself to a strict division between white and black. However, as a new wave of immigrants began to enter the country in the latter half of the nineteenth century, the law was forced to deal with an influx of individuals who did not fit so neatly into the constructed racial categories of the time. A wave of litigation ensued over the naturalization law's racial prerequisite. Fifty-two cases were reported between 1878 and 1952. In all of these cases, an individual sued to be declared white by law after being denied citizenship rights by immigration authorities on the grounds of racial ineligibility.[8]

While litigation over whiteness often grew absurd, with judges delving into the depths of antiquity, reconstructing history, and spouting rigid ideologies in order to justify their rulings, the reification of whiteness had a profound impact on shaping the immigrant experience in the United States. Whiteness was transformed into a material concept imbued with rights and privileges, such as the franchise, for those who conformed to its definition.[9] As Cheryl Harris argues, "[I]n the early years of the country, it was not the concept of race alone that operated to oppress Blacks and Indians; rather, it was the *interaction* between conceptions of race and property that played a critical role in establishing and maintaining racial and economic subordination."[10] Similarly, for immigrants of the late nineteenth and early twentieth centuries, the critical interaction between racial classifications and property played an instrumental part in the creation of socioeconomic hierarchies. In California, for example, whiteness determined the ability of immigrants to participate fully in the economy. The Alien Land Law,[11] passed in 1920 and upheld as constitutional by the Supreme Court in

1. HERMAN MELVILLE, MOBY-DICK 234-36 (Constable & Co. 1922) (1850).
2. As noted *infra* Section II.C, the conception of race was eventually problematized into a hermeneutics of color.
3. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.
4. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
5. Act of July 14, 1870, ch. 255, § 7, 16 Stat. 254.
6. *See* Immigration and Nationality Act of 1952, ch. 2, § 311, 66 Stat. 239 (codified as amended at 8 U.S.C. § 1422 (1994)).
7. There was a brief and accidental exception to the rule from June 22, 1874 to February 18, 1875. *See In re* Ah Chong, 2 F. 733, 739 (C.C.D. Cal. 1880) (noting the inadvertent omission of the word "white" from the naturalization statute that made nonwhite individuals eligible for naturalization from June 22, 1874 to February 18, 1875).
8. Curiously enough, there is only one reported case of an individual suing for naturalization eligibility on the grounds of being black by law. *See In re* Cruz, 23 F. Supp. 774 (E.D.N.Y. 1938).
9. Interestingly enough, a failure to assimilate or perform whiteness was also one of Chief Justice Marshall's grounds for denying Native Americans the full right of property possession in the Supreme Court's famous *Johnson v. McIntosh* decision. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 240, 260 (1823) (describing Native Americans as a "people with whom it was impossible to mix").
10. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1716 (1993).
11. Alien Property Initiative Act (Alien Land Law) of 1920, 1 Cal. Gen. Laws, Act 261 (Deering 1944 & Supp. 1949).

1923,[12] prohibited non-citizens from owning property in the state. Furthermore, other regulations prevented non-naturalized immigrants from exercising certain economic rights such as obtaining fishing[13] or law[14] licenses.

An examination of the racial-prerequisite cases reveals the process of litigating whiteness in action. Ian Fidencio Haney López's acclaimed book, *White by Law: The Legal Construction of Race*,[15] covers some of this ground. In his study, Haney López analyzes the Supreme Court's rulings in *Ozawa v. United States*[16] and *United States v. Thind*[17] and the cases that led up to the two decisions. Prior to the Supreme Court's rulings, Haney López observes, the lower courts wavered between two competing doctrines in determining whiteness—the common-knowledge test and the scientific-evidence inquiry. Ultimately, he argues that *Ozawa* and *Thind* marked the victory of the common-knowledge test.[18] The Court acknowledged the failure of the scientific model of racial determination and acceded to an explicitly constructed notion of race. Thus, he concludes succinctly that "[l]aw constructs race":[19] Race is not merely a scientific reality but a social construct, and the law emerges as one of the most potent forces in this process of construction.[20]

In his analysis, Haney López ignores the race prerequisite cases occurring after the Supreme Court's rulings in *Ozawa* and *Thind*, arguing that those fifteen cases "adduce little new in terms of racial rationales."[21] To him, these cases represent mere applications of the common-knowledge principle to racial determination. However, there is much to be learned from the application of precedent and from how courts chose to interpret the rulings in *Ozawa* and *Thind*.

As this study will demonstrate, a close textual reading of *Ozawa*, *Thind*, and their progeny reveals that the dominant criterion for the determination of whiteness was not a scientific standard or even a common-knowledge test, the application of which was quite problematic. Instead, whiteness was determined through performance. The potential for immigrants to assimilate within mainstream Anglo-American culture was put on trial. Successful litigants demonstrated evidence of whiteness in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a host of other traits that had nothing to do with intrinsic racial grouping. Thus, a dramaturgy of whiteness emerged, responsive to the interests of society as defined by the class in power—an "evolutionary functionalism"[22] whereby courts played an instrumental role in limiting naturalization to those new immigrant groups whom judges saw as most fit to carry on the tradition of the "White Republic."[23] The courts thereby sent a clear message to immigrants: The rights enjoyed by white males could only be obtained through assimilatory behavior. White privilege became a quid pro quo for white performance.

Part II will examine the *Ozawa* and *Thind* rulings and demonstrate how they failed to signal the triumph of a common-knowledge standard. Part III will then analyze the racial-prerequisite cases following *Ozawa* and *Thind*. As I will argue, the courts applied *Ozawa* and *Thind* by emphasizing the primacy of a dramaturgy of whiteness. Thus, performance became the dominant criterion for racial determination and the courts directly influenced the construction of racial identity. Finally, Part IV will conclude by examining the relevance of the racial-prerequisite cases to current legislation in force in the United States. In particular, I will analyze the continuing impact of racial-definition games on discrimination suits brought under 42 U.S.C. § 1981 and § 1982[24] and on immigration and naturalization laws today.

II. THE SUPREME COURT SPEAKS: *OZAWA*, *THIND*, AND THE QUEST FOR A CRITERION TO DETERMINE RACE

Prior to 1922, two competing doctrines characterized the racial-prerequisite cases: the common-knowledge test and the scientific-evidence inquiry. According to Haney López, the Supreme Court's decisions in *Ozawa* (1922) and *Thind* (1923) represented the ultimate triumph of the common-knowledge test in judicial racial determination.[25] As Haney López argues, the common-knowledge standard relied upon "popular, widely held conceptions of race and racial divisions" based entirely on perceptions that might or might not be grounded in physical appearance.[26] This methodology contrasted sharply with the scientific-evidence test, previously

12. *See* Porterfield v. Webb, 263 U.S. 225 (1923); *see also* Morrison v. California, 291 U.S. 82 (1934); Cockrill v. California, 268 U.S. 258 (1925); Webb v. O'Brien, 263 U.S. 313 (1923); Terrace v. Thompson, 263 U.S. 197 (1923).
13. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).
14. *See* United States v. Pandit, 15 F.2d 285 (9th Cir. 1926).
15. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).
16. 260 U.S. 178 (1922).
17. 261 U.S. 204 (1923).
18. *See* HANEY LÓPEZ, *supra* note 15, at 7, 8.
19. *Id.* at 19.
20. *See* Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185, 186 (1996) (reviewing HANEY LÓPEZ, *supra* note 15).
21. HANEY LÓPEZ, *supra* note 15, at 33.
22. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984).
23. *See* ALEXANDER SAXTON, THE RISE AND FALL OF THE WHITE REPUBLIC (1990).
24. 42 U.S.C. §§ 1981, 1982 (1994).
25. *See* HANEY LÓPEZ, *supra* note 15, at 107.
26. *Id.* at 5.

in vogue, which had relied upon "supposedly objective, technical and specialized knowledge for racial determination."[27]

In 1922, Takao Ozawa's petition for naturalization came before the Supreme Court. The Court ruled that Ozawa, an individual of Japanese ancestry, was not a white person and was therefore ineligible for naturalization.[28] In so ruling, the Court held that membership in the Caucasian race was a necessary (though not sufficient) condition to meet the common-knowledge definition of "white person."[29] Since Ozawa was not Caucasian, he could not qualify for naturalization.

The following year, *Thind* forced the Supreme Court to clarify which Caucasians constituted "white persons."[30] In the case, Bhagat Singh Thind, an immigrant of Asian Indian heritage, petitioned the Court for naturalization rights. As Thind argued, Indians were classified by anthropologists as Caucasians. Thus, he claimed to be white and eligible for citizenship. The Supreme Court rejected his petition and elucidated the position they had taken in *Ozawa*. The Court ruled that scientific evidence would no longer be relevant to the racial-determination inquiry.[31] While a scientific standard was consistent with the ruling in *Ozawa* (by mandating Japanese exclusion from the concept of whiteness), such a test threatened to produce a dangerous result in the *Thind* case, as scientific evidence suggested that individuals with brown or even black skin color who were anthropologically Caucasian would count as whites.[32] Such an outcome would have undermined and delegitimated the carefully constructed system of racial hierarchy that dictated social relations in the United States. Thus, the *Thind* Court abandoned the scientific-inquiry test and ruled that Indians were not white. As the Court concluded, "It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them . . . ."[33]

With these words, scholars such as Haney López and Donald Braman have concluded, *Ozawa* and *Thind* marked the victory of the common-knowledge standard.[34] Viewed in isolation, they did. However, when applied as precedent, they laid the groundwork for something much more insidious—a system of racial determination not based on scientific evidence or even on the common knowledge of an ordinary American, but a system of white performance interpreted through the eyes of judges.[35] Performance of whiteness was evidenced in two ways. First, a petitioner could point to his own adoption of white values and his personal dramaturgy of whiteness as evidence of his appropriate racial categorization. Second, a petitioner could point to the assimilation of his ethnic group into the core Western European, Christian tradition as evidence of his whiteness.[36] Both methods ultimately relied upon proof of "Anglo conformity,"[37] in the form of educational attainment, occupational dispersal, language choice, residential location, and intercultural marriage,[38] as a condition of citizenship. Thus, *Ozawa* and *Thind* enabled judges to try the ability of individuals to adopt white values and of ethnic groups to assimilate themselves into the White Republic.[39]

27. *Id.*
28. *See* Ozawa v. United States, 260 U.S. 178, 198 (1922).
29. *See id.*
30. *See* United States v. Thind, 261 U.S. 204, 206 (1923).
31. *See id.* at 208.
32. For the major scientific race treatises of the nineteenth and early twentieth centuries, see DANIEL GARRISON BRINTON, RACES AND PEOPLES (New York, N.D.C. Hodges 1890); LOUIS FIGUIER, LES RACES HUMAINES (Paris, Hachette 1872); JOHN P. JEFFRIES, THE NATURAL HISTORY OF THE HUMAN RACES (New York, E.O. Jenkins 1869); A.H. KEANE, THE WORLD'S PEOPLES (1908); CHARLES PICKERING, THE RACES OF MAN (London, H.G. Bohn 1851); and JAMES COWLES PRICHARD, THE NATURAL HISTORY OF MAN (London, H. Bailliere 1848), all of which are cited in *Dow v. United States*, 226 F. 145, 146 (4th Cir. 1915).
33. *Thind*, 261 U.S. at 209.
34. *See* HANEY LÓPEZ, *supra* note 15, at 107; Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1410 (1999). Braman, for example, argues that *Ozawa* and *Thind*
> provide extended examples of the Court's taking note of the scientific community's failure to arrive at a practicable system of racial classification, and turning to a reliance on the statutory meanings developed through the political process. The terms produced were popular and not scientific, indicating and naturalizing an understanding of social groups, not biological ones.

Braman, *supra*, at 1410.
35. This study draws upon Ariela Gross's work, which suggests that juries used performative aspects of whiteness to make racial determinations in slavery trials in the antebellum South. *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 117, 156-76 (1998). However, Gross implies that the appellate process was more immune to the use of such performative criteria (offered in the form of reputation evidence). *See id.* at 146. Furthermore, she points out that individual appellate judges were actually conscious of the "subversive possibilities of a discourse of racial performance." *Id.* at 162. In focusing on bench rulings at both the trial and appellate levels, this article suggests that judges were no more immune to the use of such performative criteria than were juries. Moreover, the naturalization cases demonstrate that judges often lacked awareness of the subversive possibilities of a discourse on racial performance, as in the case of *Ozawa*. Finally, a close textual analysis of the naturalization cases unveils the more insidious assimilationist policy considerations that factored into the judges' decisions—a powerful reflection of the broader goals of American immigration policy.
36. Interestingly, the Court doth protest too much when it quickly disclaims its assimilationist criteria as completely free of value judgments on racial worth: "It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation." *Thind*, 261 U.S. at 215. The word choice in these sentences—from "very far" to "slightest" and "merely"—belies the Court's underlying motives.
37. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 312 (1986).
38. *See id.* at 311-15.
39. *Cf.* Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 371-72, 405-06 (1997) (demonstrating the power of assimilationist criteria in shaping immigration laws and policies throughout American history).

A. *Not-So-Common Knowledge*

To begin with, the common-knowledge standard enunciated in *Ozawa* and *Thind* was quite difficult to apply, as courts did not give clear guidance on what constituted evidence of common knowledge. Both Supreme Court cases suggest that it is necessary to hark back to what the authors of the 1790 naturalization statute intended when they used the term "white person." In *Ozawa*, the Court sought to ascertain how the statute's framers would have ruled had the racial-determination issue been presented to them.[40] Similarly, the *Thind* Court held that "the words of the [naturalization] statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."[41] Thus, the Court read the statute as "written in the words of common speech, for common understanding, by unscientific men."[42] This attempt to uncover the intentions of the framers of the 1790 Naturalization Act had a lasting impact. Even in one of the final racial-prerequisite cases, *In re Hassan*, a Michigan federal district court noted that the

> question which the court must answer is whether the members of the group as a whole are white persons as Congress understood the term in 1790 when it first enacted the statute. In deciding this latter question, the test is not how the group in question would be classified by ethnologists who have made a study of racial origins, but, rather, what groups of peoples then living in 1790 with characteristics then existing were intended by Congress to be classified as "white persons."[43]

In this form, the common-knowledge test led to absurd results and flew in the face of reality, leading a number of judges to demonstrate a selective historical consciousness. For example, the *Thind* Court admitted that, in 1790,

> [t]he immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to "any alien, being a free white person," it was these immigrants . . . and their kind whom they must have had affirmatively in mind.[44]

40. *See* Ozawa v. United States, 260 U.S. 178, 195-96 (1922).
41. *Thind*, 261 U.S. at 209 (citation omitted).
42. *Id.* at 210.
43. *In re* Hassan, 48 F. Supp. 843, 846 (E.D. Mich. 1942).
44. *Thind*, 261 U.S. at 213.

Nevertheless, the Court took a conveniently inclusive view of racial categories by contending that Americans in the 1790s considered Southern Europeans to be white on an equal footing with those of Anglo-Saxon descent. As Justice Sutherland argued for the Court,

> The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as *unquestionably* akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when § 2169, reenacting the naturalization test of 1790, was adopted; and there is no reason to doubt, with like intent and meaning.[45]

In reality, however, many individuals of European descent were not readily integrated into mainstream American society. If anything, they found themselves caught on the dark side of the white/black binary. The Irish, for example, endured heavy prejudice in the United States,[46] and, for years, they were considered the blacks of Europe.[47] Similarly, Italians,[48] Greeks,[49] and Slavs[50] suffered from low social

45. *Id.* at 213-14 (emphasis added).
46. For a thorough historical account of the Irish-American struggle for integration into the White Republic, see NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995).
47. Sufficiently removed from historical memory, the statement has now become the stuff of safe, mainstream ethnic humor. *See, e.g.*, THE COMMITMENTS (Beacon Communications 1991) (featuring a quip by the main character, an Irish musician named Jimmy, who states that "[t]he Irish are the blacks of Europe. Dubliners are the blacks of Ireland. North Dubliners are the blacks of Dublin.").
48. As Leonard Dinnerstein and David Reimers observe,
> Italians . . . were one of the most despised groups. Old-stock Americans called them wops, dagos, and guineas and referred to them as the "Chinese of Europe" and "just as bad as the Negroes." In the South some Italians were forced to attend all-black schools, and in both the North and the South they were victimized by brutality. In 1875, the *New York Times* thought it "perhaps hopeless to think of civilizing them, or keeping them in order, except by the arm of the law."

LEONARD DINNERSTEIN & DAVID M. REIMERS, ETHNIC AMERICANS: A HISTORY OF IMMIGRATION AND ASSIMILATION 36 (1982), *quoted in* MARY C. WATERS, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA 2 (1990).
49. Americans of Northern European descent commonly viewed Greeks as "some kind of lower species," physically attacking them in Omaha, Nebraska, and forcing them out of Mountain View, Idaho, for example. *Id.*
50. "The Slavs," argued one turn-of-the-century physician, "are immune to certain kinds of dirt. They can stand what would kill a *white man*." EDWARD ALSWORTH ROSS, THE OLD WORLD IN THE NEW 291 (1914), *quoted in* WATERS, *supra* note 48, at 2 (emphasis added). This statement typifies the attitude towards Slavs at the time. The etymological link between "Slav" and "slave"—a link which removed Slavs from the concept of whiteness and its concomitant virtue of freedom and relegated them to the realm of blackness and its natural consequence of servitude—also symbolizes the subordinate standing of those of Slavic descent. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1107 (1985) (linking both the word "Slav" and "slave" to the Medieval Latin word "sclavus").

status,[51] and their racial status was a matter of great controversy that remained unresolved for years.[52] All told, Justice Sutherland's revisionist contention that Southern Europeans were readily amalgamated into the white race revealed a poor sense of historical awareness. A true return to the intent of the 1790 authors of the naturalization statute would have required a cessation of citizenship rights to immigrants of Slavic, Mediterranean, and even Irish descent. As an earlier court had argued in another racial-prerequisite case, *United States v. Balsara*,[53] any attempt to apply the naturalization law through the intent of the 1790 framers of the statute was farcical:

> The government contends that the words must be construed to mean what the Congress which passed the first naturalization act in 1790 understood them to mean, and, no immigration being then known except from England, Ireland, Scotland, Wales, Germany, Sweden, France, and Holland, Congress must be taken to have intended aliens coming from those countries only. The consequence of this argument, viz., that Russians, Poles, Italians, Greeks, and others, who had not theretofore immigrated, are to be excluded, is . . . absurd.[54]

Second, even a modified version of the common-knowledge test using the standards of the average, present-day man on the street would not perform adequately. A typical man would use skin color and physical features in order to determine a stranger's racial identity. However, *Ozawa*[55] and *Thind*[56] rejected this methodology.[57] Clearly, a skin-color test would not have done as a standard for racial determination of whiteness. The United States had already granted white status and naturalization rights to individuals with olive skin tones, such as Italians, Spaniards, and Slavs. Thus, the *Ozawa* Court maintained that color alone could not be determinative of whiteness. As the Court acknowledged, a skin-color test "is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races."[58] Indeed, despite the allegedly widespread embrace of the common-knowledge test in jurisprudence leading up to and including *Ozawa* and *Thind*, the common-knowledge test never really triumphed. In fact, *United States v. Dolla*[59] is highly unusual in that it is the only racial-prerequisite case of the time to actually use inspection of skin color as the primary criterion in rationalizing whiteness.[60]

B. *Performance as a Doctrinal Alternative: White Is as White Does*

On one hand, *Thind* had explicitly rejected any further application of the scientific-evidence inquiry. Nevertheless, neither *Ozawa* nor *Thind* had provided a workable common-knowledge heuristic for the determination of whiteness. Thus, this study proposes an alternative understanding of the jurisprudence of *Ozawa*, *Thind*, and their progeny based on a dramaturgy of whiteness. According to Theodore Allen, "By considering the notion of 'racial oppression' in terms of the substantive, the operative element, namely 'oppression,' it is possible to avoid the contradictions and howling absurdities that result from attempts to splice genetics and sociology [and to learn] the peculiar function of the 'white race'. . . ."[61] Behind the veil of genetics—analyzed through the scientific-evidence inquiry—and the facade of sociology—rationalized through the common-knowledge test—there was a performance standard laid out in *Ozawa* and *Thind* that would come to dominate racial-determination jurisprudence. Ultimately, racial determination would be more than science or popular understanding (whether in 1790 or 1920). Instead, it would come to provide an incentive

51. Prejudice against the new immigrant groups from Europe found expression in the broader social movements of the turn of the century. For example, proponents of Social Darwinism and eugenics asserted the racial supremacy of Northern Europeans to Europeans of Slavic and Mediterranean descent. *See, e.g.*, Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1427 (1981) (noting that "Eugenists took the cultural characteristics which made assimilation difficult for eastern and southern European immigrants and exaggerated them into innate biological deficiencies"). For examples of leading works in the field of eugenics featuring theories relating to those of Slavic and Mediterranean descent, see C. BRIGHAM, A STUDY OF AMERICAN INTELLIGENCE 192 (1923), quoted in Cynkar, *supra*, at 1427, which noted that "[t]he intellectual superiority of our Nordic group over the Alpine, Mediterranean, and negro groups has been demonstrated" as a scientific fact; and C.B. DAVENPORT, HEREDITY IN RELATION TO EUGENICS 214 (1911), quoted in Cynkar, *supra*, at 1427, which argued that Germans were "full of courage and daring" but Italians lacked "self-reliance, initiative, resourcefulness."

52. *See, e.g.*, WATERS, *supra* note 48, at 2 (observing that, at the turn of the century, those of Slavic and Mediterranean descent were viewed as a lower species of humanity, and certainly not as members of the white race).

53. 180 F. 694 (2d Cir. 1910). Incidentally, the *Balsara* court rejected the common-knowledge test in favor of the scientific-evidence inquiry. *See id.* at 695.

54. *Id.*

55. Ozawa v. United States, 260 U.S. 178, 197 (1922).

56. United States v. Thind, 261 U.S. 204, 210 (1923).

57. *But see* HANEY LÓPEZ, *supra* note 15, at 107 (arguing that a popular, common-knowledge understanding of racial determination was endorsed by the Supreme Court); Braman, *supra* note 34, at 1410 (arguing that, starting with *Ozawa* and *Thind*, the Supreme Court has progressively moved toward an understanding of racial determination as contextual and socially constructed).

58. *Ozawa*, 260 U.S. at 197.

59. 177 F. 101 (5th Cir. 1910).

60. *See* HANEY LÓPEZ, *supra* note 15, at 206 n.c.

61. 1 THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: RACIAL OPPRESSION AND SOCIAL CONTROL 28, 32 (1994).

for an individual dramaturgy of whiteness and group assimilative behavior. Performance thus became the measure of racial identity, particularly as a tie-breaker in situations in which racial boundaries remained fluid and blurry.

The Supreme Court's jurisprudence in both *Ozawa* and *Thind* contained strong shades of individual performance, despite the Court's rejection of both plaintiffs' petitions. Before examining the performative aspects of both cases, however, it is instructive to lay out the theoretical basis for the analysis. As this study argues, racial categories are largely the constructs of society, situationally malleable, rigid at times, flexible at other times. As such, racial determination has often been accomplished through the lens of performance.[62] This argument closely tracks Judith Butler's work on gender in which she argues that we are what we pretend to be: Male is as male does and female is as female does.[63]

Butler's theory of identity performance[64] is powerfully echoed in both *Ozawa* and *Thind*.[65] In *Ozawa*, the Court signposted Ozawa's educational status, his religious beliefs, and his fluent use of the English language as factors militating against its decision. As the Court irrelevantly remarked, "He was a graduate of the Berkeley, California, High School, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home."[66] The

62. I am indebted to Abner Cohen's brilliant study on the Creoles of Sierra Leone for inspiring the application of dramaturgy theory to law and social science research. *See* ABNER COHEN, THE POLITICS OF ELITE CULTURE: EXPLORATIONS IN THE DRAMATURGY OF POWER IN A MODERN AFRICAN SOCIETY (1981).

63. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 25 (1990). As Butler has argued, gender is a social construct promulgated through public drama. By pointing to the gender performances of drag queens and cross-dressers, Butler has subverted the notion of gender as a natural or fixed trait, demonstrating instead that gender is performative, based on a collection of acts representing a mythic ideal. As Butler argues, "[G]ender is always a doing, though not a doing by a subject who might be said to preexist the deed . . . . There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its result." *Id.* Thus, to Butler, public embrace of gender roles is, at its core, nothing more than a drag show.

64. As Butler argues, identity is formulated through four performative steps: (1) differentiation of oneself from others; (2) pointing to paragons of one's chosen identity; (3) development of practices to affirm one's chosen identity; and (4) repeated engagement in these practices. *See* JUDITH BUTLER, BODIES THAT MATTER at ix-xi (1993), *cited in* Camille A. Gear, Note, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L.J. 2473, 2484 (1998).

65. A number of legal scholars have drawn upon Butler's performativity analysis. *See, e.g.*, Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1166 (1996) (using Butler's performance model to analyze sexual orientation and gender identity); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 771 (1997) (using Butler's performance model to analyze gender identity); *see also* Judith Butler, *Burning Acts: Injurious Speech*, 3 U. CHI. L. SCH. ROUNDTABLE 199, 199-204 (1996) (using the performance model to analyze hate speech).

66. Ozawa v. United States, 260 U.S. 178, 189 (1922).

Court considered Ozawa's embrace of Anglo-American culture, in the form of his education, religion, and language of choice, as providing some proof of performative whiteness. The Court also made sure to acknowledge group assimilation in the form of the "culture and enlightenment of the Japanese people."[67] Meanwhile, the *Thind* Court repeatedly referred to Thind's status as a "high-class Hindu"[68] as a countervailing factor in their decision. Performative criteria took on great importance in both rulings. Indeed, the *Ozawa* Court explicitly created a broad zone of potential whiteness, whereby "[i]ndividual cases falling within this zone must be determined as they arise from time to time by what this Court has called, in another connection, 'the gradual process of judicial inclusion and exclusion.'"[69] Thus, the Supreme Court gave lower courts the ability to put the Anglo-conformity of individuals and ethnic groups on trial.

C. *Performance in the Construction of Whiteness: A Historical Tradition*

It is important to note that the performative methodology for racial determination set out in *Ozawa* and *Thind* did not emerge sua sponte. Indeed, with its references to intrinsically non-racial characteristics such as education, class, religion, language, and enlightenment, the *Ozawa* and *Thind* Courts invoked a semiology of whiteness and a performance model for racial determination with a longstanding tradition in the United States. The origins of the black/white color dichotomy itself help to illustrate the point that American notions of race have long grounded themselves in performative, rather than in scientific or naturalistic, criteria.

Contrary to the assumptions of some primordialist scholars,[70] black and white were not fixed and natural categories when the first Africans arrived on American shores. As Haney López correctly points out, "[T]he legal liabilities that would significantly define the relative identity of Whites and Blacks in North America were not in place in 1619."[71] Legal developments would play an instrumental role in constructing racial identities and formalizing perceived differences in the following centuries. However, Haney López fails to note that the white/black color dichotomy did not even exist in the early seventeenth century. The Africans brought to the

67. *Id.* at 198.

68. United States v. Thind, 261 U.S. 204, 206 (1923).

69. *Ozawa*, 260 U.S. at 198 (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877)).

70. *See, e.g.*, DERRICK BELL, RACE, RACISM AND AMERICAN LAW 6 (1st ed. 1973) (asserting that color-based racial categories were rigid and fixed during the colonial years); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 19-22 (1978) (arguing that servitude and slavery moved from a non-racial to a racial basis during the colonial years but not recognizing that racial concepts themselves were constructed, moving from a basis in religious views to a basis in skin color).

71. HANEY LÓPEZ, *supra* note 15, at 12.

American colonies in those years were distinguished from Europeans principally on the basis of religion, not color. Instead of a bifurcation between white and black to define the Self and the Other,[72] the English called themselves "Christians" while referring to the Others—the Africans—as "heathens."[73] Indeed, blacks and non-English servants of European descent were often vested with a similar legal status, the key line of demarcation being one of religion, not race or color.[74]

The report from the first race case in the Americas, *Re Davis*,[75] illustrates this point. In the decision, the defendant received punishment for engaging in sexual relations with a nameless individual of African descent. The complete report reads: "Hugh Davis is to be soundly whipt before an assembly of negroes & others for abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro which fault he is to actk Next sabbath day."[76] As the language of the report demonstrates, Davis's crime was one against his Christianity; it was defined primarily on religious, not chromatic, grounds. Moreover, the court makes no mention of hierarchy based on differences in skin tones. Instead, the most relevant division between Davis and the unnamed individual is one of religious faith.

In fact, it was only after 1680, when the first major slave codes went into effect in the American colonies,[77] that the new white/black dichotomy emerged. Two factors account for the emergence of a divide based on skin color rather than on religion. First, some blacks had converted to Christianity in an attempt to use baptism as an instrumental means to escape bondage. Second, as slavery grew increasingly national in scope, society needed a more visible and external system than internal religious beliefs for the purposes of differentiation.[78] As F.G. Bailey argues, color provides the necessary legibility to enforce hierarchies over a large territory.[79] The principal criteria for distinguishing the English from the Africans transformed from mutable religious affiliations to immutable differences in skin color. A number of states even passed statutes preventing blacks from escaping slavery through conversion to Christianity.[80] Thus, the law limited subversion of the racial hierarchy by constraining the social mobility of blacks.[81]

Since conversion was no longer an option for escape, many mulattoes resorted to litigation over their ancestry in order to escape the shackles of slavery. With the skin color criterion firmly in place, the legal system was obliged to hear their cases.[82] Nevertheless, practicing Christianity remained a viable means of performing whiteness, with a long history of recognition in American culture and courts. Similar embrace of other Western European traditions has also served as a proxy for determination of racial belonging. Racial-determination cases of the antebellum South, for example, often turned upon the ability of a petitioner to perform white womanhood or manhood through the embrace of Southern notions of virtue and honor[83]—concepts deeply engrained in the region's religious code.

Besides the key role of performative criteria in constructing the black/white divide, the *Ozawa* and *Thind* Courts also drew upon the work of earlier legal scholars who had utilized performative criteria in the determination of racial grouping. For example, John Wigmore, one of the leading evidence experts and treatise scribes of the nineteenth century, wrote an 1894 article in which he contended that the Japanese were indeed white.[84] Although his claim ostensibly rested upon the "scientific use of language and . . . [upon] modern anthropology,"[85] assimilationist criteria formed the crux of his case. While he would have denied white classification to all other Asiatic peoples, Wigmore embraced Japanese whiteness on the grounds that the Japanese have "greater affinities with us

72. Constructivist theorists of identity formation utilize the taxonomy of the Self and the Other to illustrate a common binary that results in hierarchical systems of differentiation. Typical dividing lines for the differentiation include ethnicity, *see* FREDERICK BARTH, ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE 9 (1969); Joane Nagel, *The Political Construction of Ethnicity*, *in* COMPETITIVE ETHNIC RELATIONS 93 (Susan Olzak & Joane Nagel eds., 1986), and gender, *see* JACQUES LACAN, FEMININE SEXUALITY (Juliet Mitchell & Jacqueline Rose eds. & Jacqueline Rose trans., 1985) (arguing that men need to create the concept of "woman"—a dialectic "other" or a *petit objet à*—as a response to their existential emptiness, insecurity, and lack of psychological completion); *see also* SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley ed. & trans., Bantam Books 1961) (1949); LUCE IRIGARAY, THIS SEX WHICH IS NOT ONE (Catherine Porter trans., Cornell University Press 1985).

73. *See* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 43 (1985).

74. *See* Harris, *supra* note 10, at 1717 n.20; *see also* Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 259 n.19 (1983).

75. 1 McIlwaine 479 (Va. Gen. Ct. 1630), *reprinted in* HIGGINBOTHAM, *supra* note 70, at 23.

76. *Id.*

77. *See* HIGGINBOTHAM, *supra* note 70, at 38.

78. As Erving Goffman argues, when the signifier of identity is not a visible stigma, individuals can better control information about themselves in order to avert discrimination. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 48 (1963).

79. *See* F.G. BAILEY, POLITICS AND SOCIAL CHANGE: ORISSA IN 1959, at 126 (1963); F.G. Bailey, *Closed Social Stratification in Indian Society*, 4 EUR. J. SOC. 107, 113, 120 (1963).

80. *See, e.g.*, HIGGINBOTHAM, *supra* note 70, at 36-37 (citing a 1667 Virginia statute providing that "[w]hereas some doubts have arisen whether children that are slaves by birth, and by the charity and pity of their owners made partakers of the blessed sacrament of baptism, should by virtue of their baptism be made free, it is enacted that *baptism does not alter the condition of the person as to his bondage of freedom*" (emphasis added by Higginbotham)); *id.* at 200 (citing a South Carolina statute passed in 1690 that declared that "no slave shall be free by becoming a christian").

81. *See* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 91-98 (1968).

82. *See* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 195-96 (1956); Gross, *supra* note 35.

83. *See* Gross, *supra* note 35, at 156-76.

84. *See* John H. Wigmore, *American Naturalization and the Japanese*, 28 AM. L. REV. 818 (1894).

85. *Id.* at 827.

in culture and progress and facility of social amalgamation than they have with any Asiatic people."[86] Traits such as social assimilation and the ability to contribute to progress have no relevance to an intrinsic and biological conception of race. But they do provide a performative criteria for the purposes of racial determination. Like Wigmore, the Supreme Court mixed race with class, religion, educational attainment, and linguistic choice in both *Ozawa* and *Thind*. In doing so, the Court effectively rejected any intrinsic and biological notion of race in favor of a constructed one. Since the common-knowledge test put forth by the Court was impractical in its application, performance became the basis for racial construction in the post-*Thind* era.

III. The Supreme Court's Progeny: Performance Theory, White Dramaturgy, and Group Assimilation

All told, *Ozawa* and *Thind* transformed racial-determination jurisprudence into a semiotic exercise, with judges attempting to decipher the hieroglyphics of racial identity.[87] Much like Irish immigrants, who half a century before had transformed themselves from an oppressed, nonwhite race in Ireland to oppressing members of the white race in the United States,[88] petitioning individuals in the racial-prerequisite cases succumbed to dominant theories of racial supremacy in their litigation strategies by attempting to distinguish themselves from their darker cousins. The semiotics of performance dictated a need to act more "white" than whites. Under the panopticonian gaze of the law,[89] the litigants had to perform whiteness, giving up other values and other facets of their identity. An examination of the cases after *Thind* and *Ozawa* reveals the triumph of a performative jurisprudence.[90]

A. *Performing Whiteness: The Case of Armenians*

United States v. Cartozian,[91] one of the first racial-prerequisite cases decided after *Ozawa* and *Thind*, is an excellent illustration of the performative aspects of whiteness analyzed by courts and of the ways in which courts interpreted *Ozawa* and *Thind* as precedent. As *Cartozian* suggests, there was more than a clash between scientific and common-knowledge doctrines at work in the jurisprudence of the era. Rather, the ability of individuals to perform whiteness, regardless of their scientific classification or ability to pass the common-knowledge test, became a critical part of the determination of who was white enough to earn the privilege of naturalization. In so ruling, *Cartozian* reads *Thind* as dictating a court-directed dramaturgy of whiteness, not a common-knowledge test delving into the statutory intent of the framers of the 1790 naturalization laws.[92]

86. *Id.*

87. Analyzing the courts' opinions as narratives, one could argue that the judges' pursuit of the hieroglyphics of racial identity resembles an exercise akin to that of such semiotic sleuths as Oedipa Maas, *see* Thomas Pynchon, The Crying of Lot 49 (1966), Arthur Gordon Pym, *see* Edgar Allan Poe, The Narrative of Arthur Gordon Pym of Nantucket (J. Gerald Kennedy ed., Oxford Univ. Press 1994) (1838), and Quinn, *see* Paul Auster, City of Glass (1985).

88. *See generally* Ignatiev, *supra* note 46. Noel Ignatiev's intriguing study provides a telling example of the complex system of symbols used by Irish Americans in the performance of whiteness. Ignatiev examines how the Irish transformed themselves from an oppressed race in Ireland to an oppressing race in the United States—from being part of the Other to being a part of the dominant race. *See id.* at 2. A key step in this process of transformation came with the hypervigilance of the Irish in the anti-black movement. Unadulterated embrace of white supremacy paved the way for Irish integration into the White Republic, *see* Saxton, *supra* note 23, where citizenship was defined by race. Performance even yielded to over-performance, with the Irish becoming more white than whites. "To become white [Irish immigrants] had to learn to subordinate county, religious, or national animosities, not to mention any natural sympathies they may have felt for their fellow creatures, to a new solidarity based on color—a bond which, it must be remembered, was contradicted by their experience in Ireland." Ignatiev, *supra* note 46, at 96.

89. *See* Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978); *see also* Michel Foucault, *The Eye of Power*, *in* Power/Knowledge: Selected Interviews and Other Writings, 1972-1977, at 146, 155 (Colin Gordon ed. & trans., Pantheon Books 1980) (arguing that the heightened legibility of the Panopticon is a remarkably effective and efficient means of exercising control over individuals, for "[t]here is no need for arms, physical violence, material constraints. Just a gaze. An inspecting gaze, a gaze which each individual under its weight will end by interiorising to the point that he is his own overseer, each individual thus exercizing this surveillance over, and against, himself. A superb formula: power exercised continuously and for what turns out to be minimal cost.").

90. For the sake of brevity, I have chosen to focus only on a few of the more interesting, yet still representative, racial-prerequisite cases in the post-*Ozawa/Thind* era. Eleven additional cases not discussed in this study occurred between 1923 and 1952. Like the cases discussed here, these other cases drew upon the precedent of *Ozawa* and *Thind*. Where individuals remained outside of the realm of racial ambiguity, *see supra* text accompanying note 69, the courts declared individuals ineligible for naturalization by binding legal precedent. *See, e.g.*, Samras v. United States, 125 F.2d 879 (9th Cir. 1942) (finding that Asian Indians are not white); De La Ysla v. United States, 77 F.2d 988 (9th Cir. 1935) (finding that Filipinos are not white); United States v. Gokhale, 26 F.2d 360 (2d Cir. 1928) (per curiam) (finding, in a case involving an Asian Indian, that Hindus are not white); United States v. Javier, 22 F.2d 879 (D.C. Cir. 1927) (finding that Filipinos are not white); *In re* Cruz, 23 F. Supp. 774 (E.D.N.Y. 1938) (finding that people of three-quarters Native American and one-quarter African blood do not qualify as being of African descent for the purposes of the naturalization statute); *In re* Fisher, 21 F.2d 1007 (N.D. Cal. 1927) (finding that people who are three-quarters Chinese and one-quarter Portuguese are not white); United States v. Mozumdar, 296 F. 173 (S.D. Cal. 1923) (finding, in a case involving an Asian Indian, that Hindus are not white); Sato v. Hall, 217 P. 520 (Cal. 1923) (finding that Japanese are not white); De Cano v. State, 110 P.2d 627 (Wash. 1941) (en banc) (finding that Filipinos are not white). Meanwhile, the courts used performative criteria wherever they possessed discretion and leeway in the act of racial determination. *See, e.g.*, *In re* Din, 27 F.2d 568 (N.D. Cal. 1928) (finding that Afghanis are not white); United States v. Ali, 7 F.2d 728 (E.D. Mich. 1925) (finding that Punjabis, whether Hindu or Arab, are not white).

91. 6 F.2d 919 (D. Or. 1925).

92. Thus, like the juries on race trials in the antebellum South, *see* Gross, *supra* note 35, at 117, 156-76, judges turned to a performative test for whiteness.

In a move that epitomizes the court's rejection of both the scientific inquiry and the common-knowledge test, *Cartozian* carefully distinguishes Armenians from other ethnic groups of the Near East. Under the scientific-evidence doctrine, all of the people of the Near East would technically qualify as Caucasian, and would therefore count as white persons eligible for naturalization. However, the court steers away from this view, distinguishing Armenians from such ethnic groups as Arabs, Turks, and Kurds.[93]

At the same time, the court fails to apply the common-knowledge test as purportedly set forth in *Ozawa* and *Thind*. Indeed, the court's divide between Armenians and other inhabitants of Asia Minor has little to do with how a common man of the street would view an Armenian vis-à-vis an Arab, Turk, or Kurd. After all, the court even admits that the Armenian province is within the confines of Turkey, which was classified by the common man and woman on the street at the time as an Asiatic society.[94] Moreover, the court never claims that a common person on the street, whether from 1790 or 1925, could distinguish an Armenian from an Arab, Turk, or Kurd. Nevertheless, the court draws a clear line between its treatment of Armenians and its potential treatment of other inhabitants of Asia Minor.

Instead, it is performance of whiteness and perceived assimilatory capacity that plays the critical role in the court's decision. Specifically, the *Cartozian* court uses Armenian group assimilation as a proxy for individual dramaturgy to determine the performative worthiness of Tatos O. Cartozian for citizenship. First, in the spirit of *Ozawa* and *Thind*, the court conflates the issue of religion with race, inextricably linking racial belonging with the ability of a group to utilize a fundamental tool for integration into the White Republic. As the court writes,

> Although the Armenian province is within the confines of the Turkish Empire, being in Asia Minor, the people thereof have always held themselves aloof from the Turks, the Kurds, and allied peoples, principally, it might be said, on account of their religion, though color may have had something to do with it. The Armenians, tradition has it, very early, about the fourth century, espoused the Christian religion, and have ever since consistently adhered to their belief, and practiced it.[95]

With these words, the court shifts seamlessly from an alleged discussion of race to a discussion of religion. Whether the Armenians have historically practiced Christianity is of no relevance whatsoever to any primordial or naturalistic view of racial grouping. Similarly, it is not discoverable to the common man on the street. Nevertheless, the court is constructing race as dramaturgy with religion as a primary component in the semiotics of division. For Armenians, Christianity, instead of color, becomes a proxy for racial belonging.

Such a move by the court is not without precedent. As noted earlier,[96] both *Ozawa* and *Thind* contained heavy shades of performative criteria. Furthermore, the use of religion as a prime mover in the creation of racial divisions is a critical, but frequently overlooked, tradition in American history. Not yet fixed within society's rigid racial categorizations, Armenians could point to their religious affiliation as performative proof of their whiteness.

As *Cartozian* demonstrates, religious affiliation is an important part of the racial determination of Armenians, for the embrace of Christianity enables Armenians to assimilate into mainstream Anglo-Saxon culture. "[I]t may be confidently affirmed that the Armenians are white persons, and moreover that they readily amalgamate with the European and white races,"[97] the court argues. Such language is significant since it draws directly from the ruling in *Thind*, in which the Supreme Court denied citizenship to Thind on the grounds of assimilability. "The children of English, French, German, Italian, Scandinavian, and other European parentage," the *Thind* Court noted, "quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry."[98] The implication of the Supreme Court's words is clear: Thind and his children did not possess sufficient performative capacity to act white. Thind may have been an upper-class Indian, but he was still a Hindu. Armenians, by contrast, were Christians, not "heathens," as the ancient dichotomy would dictate. On top of that, they fell into a sector of the American racial typology sufficiently fraught with ambiguity that they could rely heavily on performative criteria in order to convince the courts that they lay on the white side of the racial divide.

Performance of whiteness was not limited to religious belief. The *Cartozian* court also conflates class with race through the comical use of anecdote and the selective application of demographic evidence. In its ruling, the court cites the work of Dr. Paul Rohrbach, "a scholar of note" who recounts tales of an "Armenian who became a count in Russia,

93. *See Cartozian*, 6 F.2d at 920.
94. *See* Trucios-Gaynes, *supra* note 39, at 406.
95. *Cartozian*, 6 F.2d at 920.
96. *See supra* text accompanying notes 66-68.
97. *Cartozian*, 6 F.2d at 920.
98. United States v. Thind, 261 U.S. 204, 215 (1923).

marrying a Russian countess or baroness, and an Armenian missionary who married a German baroness."[99] With these words, performance of aristocracy and membership in the ruling class is made synonymous with whiteness. The court's syllogistic logic is irrepressible: Armenians had freely mingled with the ruling class of Europe, and all members of the European ruling class must be white; therefore, Armenians had to be white. Here, the court moves beyond racial elements to evidence of class that has no relevance to a scientific conception of race or even one based on common knowledge.[100] Instead, it is performance directed toward the bench that matters.

The court also points to the evidence from another expert witness, Dr. Barton, who provides the ultimate evidence of white performance—assimilation through marriage—by Armenians. Dr. Barton's anecdotal evidence has nothing to do with any naturalistic formulation of race. "Within his own information," declares the court without any sense of irony, Dr. Barton "knows of ten or fifteen Armenians in Boston who have married American wives."[101]

Meanwhile, the court's analysis is riddled with the kind of scientific analysis that *Ozawa* and *Thind* supposedly did away with. The language of science is employed throughout the court's analysis. The majority opinion makes sure to mention that both key witnesses it relies upon are doctors. Furthermore, the court attempts to bestow scientific legitimacy upon its opinion by resorting to demographic studies rife with purportedly relevant statistical findings. To this effect, the court cites a survey of immigrant intermarriage in New York City that found that first-generation Armenians possessed a similar rate of marriage with individuals outside of their nationality (9.63%) as other immigrants.[102] From this study, the court endorses the conclusion that there was "no discrimination respecting the intermarriage of men and women of Armenian blood with native Americans; nor has she found that the question of color or race enters as an obstacle."[103] The court's message to new immigrant groups is clear: If you can assimilate yourself into the White Republic, you will gain the privileges of whiteness. Whiteness is not a given, naturally determined, exogenous variable in the equation. Instead, it is an outcome, a reward dependent on performance and assimilation.

99. *Cartozian*, 6 F.2d at 921.
100. Ironically, the court is in fact drawing upon expert evidence and the behavior of the aristocracy to determine what common people on the street know of racial divides.
101. *Cartozian*, 6 F.2d at 921.
102. *See id.* at 921-22.
103. *Id.* at 922.

B. *Is White, Is Not White: The Case of Arabs*[104]

Two cases within a two-year span, *In re Hassan*[105] and *Ex parte Mohriez*,[106] addressed whether Arabs qualified as white persons for naturalization purposes. Despite the issuance of contrary rulings, the methodology of both courts was the same, interpreting *Thind*, *Ozawa*, and their progeny as dictating performative criteria in the matter of racial determination. Hence, the cases represented two sides of the same coin and followed the dramaturgic trend of racial jurisprudence. Indeed, the two cases powerfully demonstrate how the racial-prerequisite cases ultimately featured racial judgments made from, and performances directed toward, the bench.

In 1942, the United States District Court for the Eastern District of Michigan held that an Arab male, Ahmed Hassan, did not qualify as a white person capable of citizenship through naturalization.[107] Concerns over assimilation and religious difference provide the court with its justification. As Judge Tuttle writes,

> Apart from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe. It cannot be expected that as a class they would readily intermarry with our population and be assimilated into our civilization.[108]

Thus, in the spirit of *Cartozian*,[109] religion once again becomes a proxy for race. The court adopts the performative interpretation of *Thind*, as epitomized by *Cartozian*, as controlling. Furthermore, in distinguishing the result of *Cartozian* from the case at bar, Judge Tuttle remarks that Armenians were a

> Christian people living in an area close to the European border, who have intermingled and intermarried with Europeans over a period of centuries. Evidence was also presented in that case of a considerable amount of intermarriage of Armenian immigrants to the United States with other racial strains in our population.[110]

104. With thanks to SOUL COUGHING, *Is Chicago, Is Not Chicago*, *on* RUBY VROOM (WEA/Warner Bros. 1994).
105. 48 F. Supp. 843 (E.D. Mich. 1942).
106. 54 F. Supp. 941 (D. Mass. 1944).
107. *See Hassan*, 48 F. Supp. at 845.
108. *Id.*
109. *See supra* text accompanying note 95.
110. *Hassan*, 48 F. Supp. at 846.

Therefore, the court bases its ruling not on any scientific notion of race, which would equate Armenians with Arabs, or on any common-knowledge test, but on the performance of whiteness through religious practices and intermarriage.

Only two years later, the United States District Court for the District of Massachusetts held that an Arab man, Mohamed Mohriez, did in fact qualify as a free white person capable of obtaining citizenship through naturalization.[111] In following the precedent of *Thind* as interpreted by subsequent courts, the court delved into a performance-based analysis. While the court kept its focus on Arabs as a class, rather than on Mohamed Mohriez as a person, the emphasis was still distinctly performative.

In its short opinion, the court highlights the close link between the Arab people and the West:

> The names of Avicenna and Averroes, the sciences of algebra and medicine, the population and the architecture of Spain and of Sicily, the very words of the English language, remind us as they would have reminded the Founding Fathers of the action and interaction of Arabic and non-Arabic elements of our culture.[112]

Through its cultural-affinity analysis, the court follows its predecessors in equating scientific achievement, cultural sophistication, and the very notion of civilization with whiteness. This represents a far cry from the disingenuous claims of the *Thind* Court that disavowed any espousal of racial hierarchy.[113] Furthermore, the court highlights the role of the Arab people as one of the chief vessels through which the ancient Greek tradition has lasted to the modern era.[114] Once again, the court's racial calculus is highly performative: To act as a channel for whiteness, to have whiteness flow through the veins of the culture, is to perform whiteness and therefore to constitute whiteness.

Despite Judge Wyzansky's adoption of performative criteria in the act of racial determination, his opinion in *Mohriez* stands alone among the racial-prerequisite cases in challenging the fundamental constitutionality of the naturalization laws. Indeed, Wyzansky questions the consistency of the white-only naturalization law with the supposed principles of the American democracy. Carefully treading between the line of carrying out the law and legislating it, he writes:

> And finally it may not be out of place to say that, as is shown by our recent changes in the laws respecting persons of Chinese nationality and of the yellow race, we as a country have learned that policies of rigid exclusion are not only false to our professions of democratic liberalism but repugnant to our vital interests as a world power. In so far as the Nationality Act of 1940 is still open to interpretation, it is highly desirable that it should be interpreted . . . so as to fulfill the promise that we shall treat all men as created equal.[115]

This critique of the naturalization laws calls into question the immunity of immigration laws from many constitutional safeguards—a judicial view still in force to this very day.[116] Though courts have consistently held that the Constitution grants Congress a special plenary power over immigration policies,[117] Wyzansky's words provide a stern warning that certain policies can cross the line and are fundamentally repugnant to the very democratic ideals that the Constitution intends to promote. Moreover, these policies can lead to arbitrary lawmaking. As the prerequisite cases reveal, policies that rely upon racial determination are particularly dangerous, for they seek to reify that which is socially constructed, fluid and shifting.[118] As a result, racial-determination games often produce judicial opinions riddled with internal contradictions and dadaistic logic that find Arabs to qualify as white in some situations and nonwhite in others. All told, the body of racial-prerequisite jurisprudence suggests that the courts should get out of the determination business altogether.[119]

C. *The Performance Tie-Breaker*

Prior to *Thind*, performance played a role in racial determination as a tie-breaker of sorts. For example, in *In re Balsara*,[120] a United States district

111. *See Mohriez*, 54 F. Supp. at 942.
112. *Id.* (citations omitted).
113. *See supra* note 36.
114. *See Mohriez*, 54 F. Supp. at 942.
115. *Id.* at 943.
116. *See* Trucios-Gaynes, *supra* note 39, at 374.
117. *See, e.g.*, Sale v. Haitian Ctrs. Council, 509 U.S. 155, 201 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972).
118. In order to make subjects visible to their gaze, hegemons frequently ground their power/knowledge systems in identity signifiers, such as a person's race or appellation. The effectiveness of such signifiers as a tool for legibility naturally depends upon their immutable quality. When such signifiers turn out to be fluid, socially-constructed, and malleable through time and space, the carefully constructed edifice around such signifiers loses its value. The result has been the failure of many schemes intended to improve the human condition. *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998); John Tehranian & James C. Scott, The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname (unpublished manuscript, on file with *The Yale Law Journal*).
119. By making judicial opinions read like Tristan Tzara's *Dadaist Manifesto*, *see* TRISTAN TZARA, *Dadaist Manifesto*, *in* SEVEN DADA MANIFESTOS AND LAMPISTERIES (Barbara Wright trans., Calder 1977) (1919), such racial-determination games ultimately undermine the credibility of the rule of law and the alleged reliance of jurisprudence on rationality and logic.
120. 171 F. 294 (S.D.N.Y. 1909), *aff'd sub nom.* United States v. Balsara, 180 F. 694 (2d Cir. 1910).

court held that a Parsee was a white person for the purposes of naturalization. As Ian Haney López remarks, "Despite concluding that Asian Indians probably were not White, the court noted the need for an authoritative pronouncement on this issue, as well as the government's willingness to appeal. For these reasons, the court ruled that Balsara could naturalize."[121] But Haney López is only partially correct. As the court's concluding words reveal, performative criteria influenced the decision. "[S]ince the applicant appear[ed] to be a gentleman of high character and exceptional intelligence,"[122] the court elected to grant the petition for naturalization to Balsara. Thus, the court utilized performance as a tie-breaker in a borderline case.

In *Ozawa*, *Thind*, and their progeny, the use of performative criteria continued, with courts invoking a dramaturgy of whiteness as a tie-breaker in close questions about race. In *United States v. Pandit*,[123] decided three years after *Thind*, certain critical facts about Sakharam Ganesh Pandit, an Indian immigrant to the United States, played a vital role in the trial court's declaration of Pandit's whiteness. Such details were also important enough to the Ninth Circuit that the court emphasized them in its brief statement of the facts. This information included repeated references to Sakharam Ganesh Pandit's Brahman caste and high social standing, detailed descriptions of his impressive wealth, an extensive résumé of his educational training, and a passing, but all too significant, reference to his marriage to a white woman.[124]

In 1939, *Wadia v. United States*[125] overturned *Balsara* in light of the Supreme Court's decisions in *Ozawa* and *Thind*. Nevertheless, the court still used performative criteria in making its decision. Indeed, Judge Augustus Hand made sure to signpost Wadia's Zoroastrian religion at one point in the brief opinion.[126] While the court ruled that Parsees cannot qualify as white people since they are too closely associated with the nonwhite Hindus, it still quoted passages from both *Thind* and *Ozawa* that dictated the use of assimilationist criteria in racial determination and the availability of performative outlets. The court first cited a passage from *Thind* that provided a possible escape for even those of "primarily Asiatic stock" to be considered white.[127] The court then referred to *Ozawa* as stating that there were "some Asiatics whose long contiguity to European nations and assimilation with their culture has caused them to be thought of as of the same general characteristics."[128] While Parsees, with their allegedly inextricable link to the Hindu people, could not make the whiteness cut, the court left open the door for other ethnic groups finding themselves caught between two racial groupings. The court's message was clear: White performance would still be rewarded with white privilege.[129]

IV. WHITE PERFORMANCE, RACIAL DETERMINATION, AND THE LAW TODAY

A. *Modern Immigration Laws: Rewarding Performance with Privilege*

In the area of immigration and naturalization law, we have come a long way from the racial-prerequisite cases of the first half of the century. With the McCarran-Walter (Immigration and Nationality) Act of 1952, Congress finally abandoned the race-based system of naturalization in existence since 1790.[130] After 1952, members of any ethnicity and race could become citizens; yet the quota system based on national origins, which limited annual immigration from each nationality to two percent of the respective nationality's share of the United States population in 1890, remained intact. It was not until 1965 that Congress finally did away with the quota system—a system that placed heavy restrictions on immigrants from anywhere in the world besides Western Europe.[131]

However, despite these reforms, a performative/white bias continues to exist in the immigration system. First of all, the new system's per-country allocations continue to limit immigration from historically excluded countries,[132] effectively limiting immigration by individuals of certain nonwhite races. More importantly, the recent debate over immigration reform has called for greater assimilation of immigrant groups into the United States. For example, the final report of the Commission on

121. HANEY LÓPEZ, *supra* note 15, at 206 app. a n.a.
122. *Balsara*, 171 F. at 295.
123. 15 F.2d 285 (9th Cir. 1926).
124. *See id.* at 285.
125. 101 F.2d 7 (2d Cir. 1939).
126. *See id.* at 7.
127. *Id.* at 8 (citing United States v. Thind, 261 U.S. 204, 214 (1923)). Admittedly, the *Thind* Court does go on to declare that "there is much in the origin and historic development of the statue to suggest that no Asiatic whatever was included," *Thind*, 261 U.S. at 214, though it does so in dicta.
128. *Wadia*, 101 F.2d at 9 (citing Ozawa v. United States, 260 U.S. 178, 198 (1922)).
129. This sentiment was strongly echoed in the Supreme Court's *Korematsu* case. As Justice Murphy's dissent in the case argues, outright racism and the failure of Japanese immigrants to assimilate themselves into the White Republic (unlike German and Italian immigrants) played a vital role in the military's decision to single them out for internment and the Supreme Court's decision to declare the military's actions constitutional. *See* Korematsu v. United States, 323 U.S. 214, 236-40 (1944) (Murphy, J., dissenting). Thus, white performance by both German and Italian Americans was rewarded with protection from internment and the failure of Japanese Americans to assimilate was punished. I want to thank Kenneth Stahl for pointing out the link to *Korematsu*.
130. Immigration and Nationality Act of 1952, ch. 2, § 311, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1422 (1994)).
131. *See* Trucios-Gaynes, *supra* note 39, at 399.
132. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 298 (1996).

Immigration Reform in 1997 called for the "Americanization" of new immigrants through a "process of integration by which immigrants become part of our communities and by which our communities and the nation learn from and adapt to their presence."[133] In particular, the report emphasized the importance of these new immigrant groups to conform to white, Christian, Western European norms, especially in their adoption of English as their primary language. Here, the old quid pro quo present in the racial-prerequisite cases of the early half of the century is repeated: If you can assimilate yourself into the White Republic, you will gain the privileges of whiteness. Without white performance, immigration reform would be necessary and privileges would be revoked from these minority groups. The rhetoric of isolationists and other advocates of tighter borders has even made this quid pro quo explicit. White performance is still a condition of white privilege.[134]

B. *Race and the Constitution: Cases Under § 1981 and § 1982*

From the development of the black/white dichotomy in the colonial years and the whiteness trials of the antebellum South to the racial-prerequisite trials of the first half of the twentieth century, American courts have enforced racial divides on the basis of performance. This points to an unoriginal, but critical, observation about the very notion of race: It is nothing more than a social construct, situationally dependent, open to manipulation, and thoroughly unnatural. Yet despite this observation, the reality of racial construction continues to be ignored in American jurisprudence today—with harmful consequences.

The doctrines found in the racial-prerequisite cases are not merely a curiosity of our past. Rather, they continue to resonate in the law today in the form of racial-definition games. Courts (and legislatures) continue to put themselves in a position where they must determine racial categorizations in order to determine the outcomes of lawsuits. As the prerequisite cases earlier this century demonstrate, such a venture into racial determination is dangerous, for the ambiguous notion of race often leaves courts free to fiddle with cases to achieve unjust ends. This potential for danger has been realized in a number of suits brought under 42 U.S.C. § 1981 and § 1982.

133. U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 26 (1997).

134. It is critical to note that white performance is not the only form of racial dramaturgy. Where nonwhite groups dominate, performance of nonwhiteness can be a condition for nonwhite privilege. For example, Italian-American teenagers in the inner-city frequently perform nonwhiteness to distance themselves from the white hegemon and to facilitate their assimilation with other urban youth.

To begin with, the racial-prerequisite cases of the past bear great relevance to modern civil rights actions; *Thind*, *Ozawa*, and their progeny raise a number of critical philosophical questions in relation to § 1981 and § 1982 actions. For example, can Caucasians sue under § 1981 and § 1982 for racial discrimination? Should it matter what race someone belongs to in order to maintain a § 1981 or § 1982 action when race is a social construct in the first place? Why continue to use white citizens as the standard by which to measure economic, political, and social rights under § 1981 and § 1982 when the definition of white continues to cause innumerable problems? The answer to these questions has profound implications for states like Hawai'i, where control of socioeconomic resources increasingly lies in the hands of a nonwhite majority, and American society more generally as we continue to grow more heterogeneous in ethnic composition. Furthermore, it remains disputed whether individuals of Caucasian descent such as Arabs, Jews, and Indians, who may still face racially based discrimination, can sue under § 1981 and § 1982. The cases addressing these issues reveal how courts continue to avoid recognition of race as a social construction. Much like the racial-prerequisite cases of the early half of the century, this ignorance has led to miscarriages of justice in a number of cases.

Saint Francis College v. Al-Khazraji[135] appeared to settle the issue of whether Arabs could qualify as a racial group capable of suing under 42 U.S.C. § 1981. In that case, the plaintiff, an Arab professor, was denied tenure by Saint Francis College, allegedly on the basis of his racial background. As a result, he filed a § 1981 action against the college. Originating from the Civil Rights Act of 1866,[136] § 1981 dictates that

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.[137]

As the Supreme Court held in *Runyon v. McCrary*,[138] the section applies to all racial discrimination in both private and public contracts.[139] Therefore, Al-Khazraji claimed that the college's denial of tenure deprived him of the contractual rights enjoyed by similarly positioned white citizens. In response, the college contended that Al-Khazraji was Caucasian and

135. 481 U.S. 604 (1987).

136. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (reenacted as Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144) (codified as amended at 42 U.S.C. §§ 1981, 1982 (1994)).

137. 42 U.S.C. § 1981.

138. 427 U.S. 160 (1976).

139. *See id.* at 168, 174-75.

therefore not a member of a race different from the defendant's. As such, he had no standing under § 1981. Although the district court held that "§ 1981 does not reach claims of discrimination based on Arabian ancestry,"[140] the Third Circuit reversed[141] and the Supreme Court affirmed the reversal, holding that

> a distinctive physiognomy is not essential to qualify for § 1981 protection. If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.[142]

Thus, Saint Francis College could not escape a § 1981 action on the grounds that Al-Khazraji was technically Caucasian.

Only a few years later, however, Lockheed Missiles and Space Company managed to get a § 1981 suit in California Superior Court dismissed on the grounds that the plaintiff, an Indian male, was technically Caucasian and could not sue his employers for denying him the rights of a white citizen.[143] As the trial court held, "[B]y definition, [Sandhu] is Caucasian . . . [and] a person who is in fact Caucasian may not complain of race."[144] Thus, the trial court accepted Lockheed's view that *Al-Khazraji* actually acknowledged the familiar division of the human race into only three groupings—Caucasoid, Mongoloid, and Negroid.[145]

Ultimately, the California Court of Appeals reversed and remanded the case. However, the trial court's position shows the continuing danger of the courts' failure to recognize the reality of racial construction. Indeed, the trial court's position in *Sandhu* provides a prime example of the disingenuous use of the past as negative precedent.[146] By accepting the tripartite racial division of human beings, the California trial court clashed with the *Thind* Court's definition of whites (which excluded Indians). After all, the trial court could claim that such a definition led to the unjust denial of naturalization rights to Indian immigrants. However, such use of the past as negative precedent only furthered racial injustice in the *Sandhu* case. When it was a matter of denying naturalization rights, courts found Indians to be nonwhite; when it was a matter of denying relief for discrimination, courts found Indians to be white. The instrumental construction of race was at work in both *Thind* and *Sandhu*.

The failure to learn from the past and acknowledge the extent to which race is a social construct almost led to an unjust result in *Shaare Tefila Congregation v. Cobb*.[147] In that case, the United States District Court for the District of Maryland dismissed charges against eight private defendants for violations of federal law arising from the defendants' alleged desecration of a congregation's synagogue.

One of the key issues in the case centered on whether the defendants' alleged acts constituted racial discrimination in violation of 42 U.S.C. § 1982, for the defendants admittedly perceived Jews as a racially distinct group. Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[148] The congregation averred that desecration of the synagogue stemmed from racial prejudice and deprived them of the right to hold real and personal property.[149] As both the district court and the Fourth Circuit (in affirming the lower court) held, § 1982 was not meant to attach to "situations in which a plaintiff is not a member of a racially distinct group but is merely perceived to be so by defendants."[150] As Jews did not constitute a racially distinct group, the court had to sustain the defendants' 12(b)(6) motion.

In their rulings, the two courts failed to recognize race as a social construction, rather than as a scientific fact or an inherent element of human existence. "Although we sympathize with appellant's position," the court noted, "we conclude that it cannot support a claim of racial discrimination solely on the basis of defendants' perception of Jews as being members of a racially distinct group. To allow otherwise would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants."[151] Strangely, the court did not realize that *all* discrimination suits arise from these senseless misperceptions; as the racial-prerequisite cases have taught us, racial categories themselves are arbitrary products of human will. The poignant words of Judge Wilkinson's partial concurrence perfectly captured this critique of the majority view: "All

140. *Al-Khazraji*, 481 U.S at 606 (footnote omitted).
141. Saint Francis College v. Al-Khazraji, 784 F.2d 505 (3d Cir. 1986).
142. *Al-Khazraji*, 481 U.S. at 613.
143. *See* Sandhu v. Lockheed Missiles & Space Co., 26 Cal. App. 4th 846, 850 (Cal. Ct. App. 1994).
144. *Id.* at 850 (quoting Judge Stone's unpublished opinion for the Superior Court of Santa Clara County).
145. *See id.* at 851 (citing *Al-Khazraji*, 481 U.S. at 610 n.4).
146. *See* Deborah A. Widiss, Note, *Re-viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237 (1998). As Widiss notes, the tension between stare decisis and evolution in the law is particularly salient "in a jurisprudence that defines itself in counter-distinction to the past, yet works within a structure that embraces a conservative adherence to past decisions as precedent." *Id.* at 238. Antidiscrimination law is a prime example of one of these areas in the law.
147. 606 F. Supp. 1504 (D. Md. 1985), *aff'd*, 785 F.2d 523 (4th Cir. 1986), *rev'd*, 481 U.S. 615 (1987).
148. 42 U.S.C. § 1982 (1994).
149. *See Shaare Tefila Congregation*, 785 F.2d at 526.
150. *Id.*; *see also Shaare Tefila Congregation*, 606 F. Supp. at 1504, 1508-09.
151. *Shaare Tefila Congregation*, 785 F.2d at 527.

racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group."[152]

Although the Supreme Court ultimately reversed the Fourth Circuit, its resolution of the case remained problematic: The Supreme Court itself failed to establish an unambiguous test for § 1982 violations and chose to ignore the lower courts' definition of race.[153] Writing for the majority, Justice White suggested that § 1982 did protect plaintiffs from intentional discrimination solely because of their "ancestry or ethnic characteristics."[154] However, his opinion never explained how this phrase could apply to Jews, who arguably constitute neither a distinct race nor an ethnic group.[155] Furthermore, the Court made no mention of Judge Wilkinson's subjective-perception test, which acknowledges race as a social construction. Adoption of such a test—which reflects the reality of racial categories—would "avoid[] the problem of defining ancestry or ethnicity by expanding the scope of racial discrimination to include subjective perceptions of groups as race. Jews would qualify under this test regardless of their status as a religious group because Jewish people are perceived as a race."[156] Instead, the Supreme Court stubbornly refused to acknowledge race as a social construct.[157] In so doing, the Court left the door open for it to continue to engage in games of racial determination that can only place excessive discretion in the hands of judges and lead to perversions of justice, whereby—for example—Indians are declared nonwhite for the purpose of denying them citizenship, but declared white for the purpose of denying them § 1981 relief when they face discrimination.[158]

152. *Id.* at 528 (Wilkinson, J., concurring in part and dissenting in part).

153. *See* Joseph Avanzato, Note, *Section 1982 and Discrimination Against Jews:* Shaare Tefila Congregation v. Cobb, 37 AM. U. L. REV. 225 (1987) (arguing that the Fourth Circuit decided the case incorrectly and that the Supreme Court's reversal of the lower court failed to provide guidance for future § 1982 cases).

154. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987) (quoting Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987)).

155. On a related note, questions abound on the definition of "Jewish." *See, e.g.*, MERYL HYMAN, "WHO IS A JEW?" (1998); JACK WERTHEIMER, A PEOPLE DIVIDED: JUDAISM IN CONTEMPORARY AMERICA 173-80 (1993); Nancy Caren Richmond, Comment, *Israel's Law of Return: Analysis of Its Evolution and Present Application*, 12 DICK. J. INT'L L. 95 (1993).

156. Avanzato, *supra* note 153, at 255.

157. This assertion directly contradicts the thesis of Donald Braman's recent article, *Of Race and Immutability*, which argues that the Supreme Court has consistently, at least since *Ozawa* and *Thind*, moved toward a view of racial status as the product of social and political institutions, and not of biology. *See* Braman, *supra* note 34. First, if this were the case, it would be difficult to rationalize the results of *Al-Khazraji* in the district court and the court of appeals. Second, Braman's article almost entirely ignores the Supreme Court's opinion in *Shaare Tefila Congregation*, even though it was issued in conjunction with *Al-Khazraji*, a case that Braman discusses extensively. *See id.* at 1442-45.

158. Similarly, courts accepted a broad definition of blackness to uphold social sanctions such as segregation against African Americans, *see* Plessy v. Ferguson, 163 U.S. 537, 541, 550 (1896) (upholding as reasonable the classification of an individual of "one-eighth African blood" as black), but imposed a narrow definition of blackness to deny those of African blood the privileges of African descent, *see In re* Cruz, 23 F. Supp. 774 (E.D.N.Y. 1938) (denying the right to naturalization to an individual of one-quarter African blood on the grounds that he was not of African descent).

V. CONCLUSION: MOVING BEYOND RACE

This study attempts to move race theory beyond the simple black/white paradigm. Like most Americans, academics tend to focus exclusively on the dichotomy between black and white and not on the broader racial issues in our nation. While the black/white paradigm has played a profound role in our nation's history, it does not address the myriad issues related to those caught in blurry and gray portions of the divide, both in law and praxis, such as those of Japanese, Chinese, and Indian descent. We have never existed in a truly bipolar racial society, and academic scholarship is increasingly recognizing this.[159]

Furthermore, through an analysis of the racial-prerequisite cases after 1923, this study supports the view that race is a social construction.[160] Categories are situational.[161] They can alter over time. For example, the notion of white has undergone a significant transformation in the United States over the past two centuries. In the early years of the republic, white referred to those of Anglo-Saxon or Teutonic descent. Thus, the Irish and Italians were viewed as outside of the category. Over time, however, the Irish and Italians became a part of a broadened, more flexible definition of white.[162] Additionally, racial categories can alter over space. In modern-day Hawai'i, for example, the term *haole*, universally used by locals to refer to Caucasians, does not include those of Portuguese or Jewish descent.[163] Performative criteria helped the racial-prerequisite cases construct their own vision of whiteness.

The courts' problematic theory of race continues to plague recent jurisprudence by threatening to deprive deserving individuals of protection from discriminatory activity. But the impact of the courts' theories on race is even more grave than this. According to Robert Gordon,

159. *See, e.g.*, Robert S. Chang, *The Nativist's Dream of Return*, 9 LA RAZA L.J. 55, 55 (1996); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 960-69 (1995); William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 10-15 (1995); Trucios-Gaynes, *supra* note 39, at 373.

160. For other works demonstrating the fundamental flaws of a scientific/naturalistic view of race, see MICHAEL BANTON & JONATHAN HARWOOD, THE RACE CONCEPT 43-60 (1975); ASHLEY MONTAGU, STATEMENT ON RACE 46-50 (3d ed. 1972); Frank B. Livingstone, *On the Nonexistence of Human Race*, *in* THE CONCEPT OF RACE 46, 46-59 (Ashley Montagu ed., 1964); and Henry P. Lundsgaarde, *Racial and Ethnic Classifications: An Appraisal of the Role of Anthropology in the Lawmaking Process*, 10 HOUS. L. REV. 641, 648-49 n.23 (1973).

161. *See* John Okamura, *Situational Identity*, 4 ETHNIC & RACIAL STUD. 452 (1981).

162. *See, e.g.*, *supra* notes 46 and 61.

163. *See* PAUL THEROUX, THE HAPPY ISLES OF OCEANIA 476 (1992).

> [T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.[164]

As such, a major step in the dismantling of the racial stratification of our nation will come from explicit recognition by the courts that race is a social construction, not an inherent part of human existence or a scientific fact. Only then will we be able to recognize racial division as nothing more than a subjective and irrational perception that oppresses us all; only then will our nation set out on the path towards equality for all of its people.

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164. Gordon, *supra* note 22, at 109.